

2014 WL 3817317 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Karen LEITNER, Plaintiff,

v.

SADHANA TEMPLE OF NEW YORK, INC., a New York corporation; Kunwar
Surendra Kumar; Sarah Carson; Naomi Aschner; Barbara Thompson, Defendants.

No. cv 13-7902-MMM-E.
July 17, 2014.

**Notice of Motion and Motion to Dismiss or, Alternatively, to Strike Third
Amended Complaint; Memorandum of Points and Authorities in Support Thereof**

Stroock & Stroock & Lavan LLP, [James E. Fitzgerald](#) (State Bar No. 108785), [John R. Loftus](#) (State Bar No. 126841), [Bryan M. Wittlin](#) (State Bar No. 286382), 2029 Century Park East, Los Angeles, CA 90067-3086, Telephone: 310-556-5800, Facsimile: 310-556-5959, Email: lacalendar@stroock.com, for defendants, Sadhana Temple of New York, Inc., Sarah Carson, Naomi Aschner and Barbara Thompson and Kunwar Surendra Kumar.

the Honorable [Margaret M. Morrow](#).

Action filed: October 25, 2013

[Declarations of Bryan M. Wittlin filed, and [Proposed] Order lodged, concurrently herewith]

Date: October 20, 2014

Time: 10:00 a.m.

Courtroom: 780

TO: PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 20, 2014, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 780 of the Edward R. Roybal Building of the United States District Court for the Central District of California, Western Division - Los Angeles, located at 255 E. Temple Street, Los Angeles, CA 90012, Defendants Sadhana Temple of New York, Inc. ("Sadhana Temple"), Naomi Aschner, Sarah Carson, Barbara Thompson and Kunwar Surendra Kumar ("Defendants") will and hereby do move the Court pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for an Order granting their Motion to Dismiss Plaintiff Karen Leitner's claims in her Third Amended Complaint ("TAC") for (1) constructive fraud; (2) breach of fiduciary duty; (3) conversion; (4) financial **elder abuse**; (5) intentional infliction of emotional distress (except to the extent based on Defendants' alleged failure to provide her with retirement money pursuant to the Court's ruling in its Order Granting In Part And Denying In Part Defendants' Motion to Dismiss the Second Amended Complaint (Doc. 65)); (6) involuntary dissolution of joint venture, and (7) accounting, and an Order granting Sadhana Temple's Motion to Dismiss Plaintiff Karen Leitner's Third Amended Complaint against Sadhana Temple in its entirety. Alternatively, Defendants move pursuant to [Federal Rule of Civil Procedure 12\(f\)](#) to strike the following portions of the TAC:

- ¶1 at p. 2:1: "as part of a joint venture with Defendants"
- ¶2 at p. 2:28-3:1: "The Temple is made up of the same Family members as the joint venture";

- ¶ 2 at p. 3:7-3:17: “Plaintiff fell victim . . . would constantly verbally and physically **abuse** each member.”;
- ¶ 2 at 3:18: “who was a part of the joint venture”;
- ¶ 9 at p. 5:4: “joint venturer, partner”;
- ¶ 14 at p. 6:22-25: “As part of the initiation . . . the following morning.”;
- ¶ 17 at p. 7:10: “(partnership, joint venture)”;
- ¶ 17 at p. 7:11-25: “that would, among other things . . . causing severe mental and psychological damage to Plaintiff.”;
- ¶ 30 at p. 10:11: “joint venture”;
- ¶ 43 at p. 12:18: “special relationship that of a joint venture”;
- ¶ 47, p. 13:20: “joint venture”;
- ¶ 70 at p. 20:18: “joint venture. Pursuant to the joint venture”;
- ¶ 71 at p. 20:24: “joint venture”;
- ¶ 71 at p. 20:25-21:3: “See *Orosco* . . . 370.)”;
- ¶ 111 at p. 29:15: “joint venture. Pursuant to the joint venture.”;
- ¶ 137 at p. 35:8:11: “Defendant . . . utilized mind games, physical **abuse** . . . sex, rape . . . to control Leitner.”;
- ¶ 142 at p. 36:10: “The very last act of . . . continuous.”;
- ¶¶ 24, 27, 28, 32, 33, 34, 39, 40, 41, 57, 58-68, 73, 97-109, 121, 132, 133, 138, 139, 140, 151, 153-165, 166-180; and
- pp. 46:5-13, 46:28-47:8 and 48:9-49:2

This motion is made following a conference of counsel pursuant to L.R. 7-3 that took place on July 14, 2014, as described more fully in the Declaration of Bryan M. Wittlin filed concurrently herewith.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Bryan M. Wittlin, the pleadings and records on file herein, and such other evidence and arguments as may be presented to the Court prior to or at the hearing of this Motion.

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP

By: /s/ James E. Fitzgerald

James E. Fitzgerald

Attorneys for Defendants

Sadhana Temple of New York, Inc., Sarah Carson, Naomi Aschner, Barbara Thompson and Kunwar Surendra Kumar

TABLE OF CONTENTS

I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND	2
A. Allegations In The Prior Complaints	2
B. Court Grants In Part Defendants' Motion To Dismiss The SAC	3
C. Allegations In The TAC	5
III. ARGUMENT	6
A. The Applicable Legal Standards	6
B. Leitner's Claim For Breach Of Fiduciary Duty Fails Because It Seeks To Relitigate Whether The Family Is A Joint Venture	7
C. Leitner's Claim For Constructive Fraud Is Not Viable	8
D. The Conversion Claim Should Be Dismissed Because Leitner Fails To Identify Specific Funds That Were Converted	9
E. Leitner's Claim For Financial Elder Cannot Be Sustained	11
1. The Elder Abuse Law Of California And Oregon Differ	12
2. California's Interest In Having Its Law Applied To This Dispute Heavily Outweighs Oregon's Interest ...	12
F. Leitner's Claim For Intentional Infliction Of Emotional Distress Premised on Allegations Of Physical And Mental Abuse Cannot Be Sustained	14
1. The Court Unequivocally Held The Claims For Physical And Mental Abuse Are Time-Barred	14
2. The Court Ruled That Tolling For "Mental Incapacity" Or Insanity Does Not Apply In This Case	15
3. The Court Ruled That Tolling For "Mental Incapacity" Or Insanity Does Not Apply Based On The Facts Alleged	16
G. Leitner's Claims For Dissolution of Joint Venture And Accounting Lack Merit Because The "Family" Is Not A Partnership Or Joint Venture	17
H. All Of The Claims Against Sadhana Temple Fail	17
IV. CONCLUSION	20

TABLE OF AUTHORITIES

<i>Amtower v. Photon Dynamics, Inc.</i> , 158 Cal. App. 4th 1582 (2008)	7
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	6
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	6, 8
<i>Bible v. Rio Properties, Inc.</i> , 246 F.R.D. 614 (C.D. Cal. 2007)	12
<i>In re Conseco Ins. Co. Annuity Mktg. & Sales Practices Litig.</i> , 2007 U.S. Dist. LEXIS 12786 (N.D. Cal. Feb. 12, 2007)	11
<i>Dealertrack, Inc. v. Huber</i> , 460 F. Supp. 2d 1177 (C.D. Cal. 2006)	9
<i>Denham v. Farmers Ins. Co.</i> , 213 Cal. App. 3d 1061 (1989)	12, 14
<i>Fulani v. Brady</i> , 935 F.2d 1324 (D.C. Cir. 1991), <i>cert denied</i> , 502 U.S. 1048 (1992)	20
<i>Haigler v. Donnelly</i> , 18 Cal. 2d 674 (1941)	9
<i>Kearney v. Salomon Smith Barney, Inc.</i> , 39 Cal. 4th 95 (2006)	12
<i>McCann v. Foster Wheeler LLC</i> , 48 Cal. 4th 68 (2010)	13
<i>McGhee v. Arabian Am. Oil Co.</i> , 871 F.2d 1412 (9th Cir. 1989)	11, 12
<i>McKell v. Washington Mutual, Inc.</i> , 142 Cal. App. 4th 1457 (2006)	9
<i>Messerall v. Fulwider</i> , 199 Cal. App. 3d 1324 (1988)	9
<i>Mid-Century Ins. Co. v. Gardner</i> , 9 Cal. App. 4th 1205 (1992)	19
<i>Moss v. U.S. Secret Service</i> , 572 F.3d 962 (9th Cir. 2009)	6
<i>N. California Collection Servs. Inc. of Sacramento v. Cent. Sierra Const., Inc.</i> , 2:06-CV-01899 JAM DAD, 2008 WL 3876266 (E.D. Cal. Aug. 20, 2008) <i>aff'd sub nom.</i> 370 F. App'x 774 (9th Cir. 2010)	11
<i>Neilson v. Union Bank of California, N.A.</i> , 290 F. Supp. 2d 1101 (C.D. Cal. 2003)	18, 19
<i>Nelson v. Int'l. Paint Co.</i> , 716 F.2d 640 (9th Cir. 1983)	11

<i>PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP</i> , 150 Cal. App. 4th 384 (2007)	9, 10
<i>Postal Instant Press, Inc. v. Kaswa Corp.</i> , 162 Cal. App. 4th 1510 (2008)	18
<i>Pugliese v. Super. Ct.</i> , 146 Cal. App. 4th 1444 (2007)	14
<i>Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.</i> , 49 Cal. App. 4th 472 (1996)	9
<i>Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC</i> , 634 F. Supp. 2d 1009(N.D. Cal. 2007)	9
<i>Trustees of S. Cal Pipe Trades Health & Welfare Trust Fund v. Temecula Mech., Inc.</i> , 438 F. Supp. 2d 1156 (C.D. Cal. 2006)	10
<i>Weiner v. Fleischman</i> , 54 Cal. 3d 476 (1991)	7
<i>Whittlestone, Inc. v. Handi-Craft Co.</i> , 618 F.3d 970 (9th Cir. 2010)	6
Statutes	
Cal. Civ. Code § 1573	9
Cal. Code Civ. Proc. § 335.1	14
Cal. Corp. Code § 5142	19
Cal. Corp. Code § 8510	19
Cal. Corp. Code § 8510(e)	19
Cal. Corp. Code. § 16101(9)	17
Cal. Welf. & Inst. Code § 15610.27	12, 14
Cal. Welf. & Inst. Code § 15610.30(a)(1)	11, 12
Fed. R. Civ. P. 9(b)	9
Fed. R. Civ. P. 11	2, 5
Fed. R. Civ. P. 12(b)(6)	1, 6
Fed. R. Civ. P. 12(f)	1, 5, 6
N.Y. Not-for-Profit Corp. Law § 1101	19
N.Y. Not-for-Profit Corp. Law § 1102(b)	19
Or. Rev. Stat. Ann. § 124.100(6)	14

I. INTRODUCTION

This Motion is directed to Plaintiff Karen Leitner's fourth iteration of her complaint against some members of a “Family” of friends she lived with from 1970-2003. Leitner alleges she was physically and mentally **abused** while she lived with the Family, and that she was promised an “equal share” of the Family's pooled assets as retirement benefits when she turned 65 years old, which she did in 2012. Leitner left the Family and severed all contact with its members in 2004, at the latest. In ruling on Defendants' Motion to Dismiss the Second Amended Complaint (“SAC”), the Court held that Leitner's claims based on **abuse**, and for monetary benefits other than “retirement benefits,” are time-barred. The Court dismissed eight of Leitner's ten claims and granted leave to amend *limited* to the extent Leitner could cure the deficiencies identified by the Court.

Leitner's Third Amended Complaint (“TAC”) fails to adhere to the Court's Order and persists with her claims, some on the *very same basis* that this Court rejected in the SAC. Leitner seeks to relitigate two critical issues. First, she continues to assert a claim for intentional infliction of emotional distress based on allegations of **abuse** while she was with the Family (from 1970 to 2003). Leitner does not add any allegations that save this claim. Indeed, she has ignored the Court's ruling that the claim is time-barred.

Second, Leitner persists with several claims premised on her theory that the Family -- which she claims agreed to pool resources and share their lives together constitutes a joint venture. The Court unequivocally held that the Family is not a joint venture. In her newest complaint, Leitner alleges no new facts to justify her claim that a joint venture ever existed.

Defendants move to dismiss pursuant to [Rule 12\(b\)\(6\)](#) each of Leitner's claims aside from her fraud and promissory estoppel claims. Alternatively, Defendants move to strike the same claims under [Rule 12\(f\)](#) for failure to adhere to the Court's prior order.

Finally, despite the Court's warning in its Order on the Motion to Dismiss the SAC, Leitner's newest allegations in the TAC are contradicted by her own recent deposition testimony taken *before* the TAC was filed. Accordingly, Defendants reserve the right to move for [Rule 11](#) sanctions if Leitner does not withdraw the unsupported allegations in the TAC.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Allegations In The Prior Complaints

In 1970, Leitner began attending meditation sessions held by Kunwar Surendra Kumar (“Kumar”). (First Amended Complaint (“FAC”) ¶13-14 & SAC ¶13-14) Shortly thereafter, she joined the “Family.” The Family consists of individuals who lived together and contributed funds to their shared pool of assets; Defendants Aschner, Carson, Thompson and Kumar are members of the Family. (SAC ¶¶ 6-8, 16, 45) Leitner alleged that on August 14, 1970 she was promised that if she contributed her resources, she “would have an equal share of the combined pooled resources,” and that her “future would be taken care of.”¹ (FAC ¶ 38; SAC ¶ 45) Leitner alleged that she was promised the funds she contributed would be “available upon her request.”² *Id.*

In the SAC, Leitner added that when she joined the Family in 1970 Kumar specifically promised she would receive her “share” of the Family money when she reached the “retirement age” of 65. (SAC ¶¶2, 36, 46) The SAC also added that “all” of the “work, income, labor property and time” each member contributed was promised to “pay out” at retirement age to provide a “substantial lifestyle increase.” (SAC ¶2 (emphasis added))

Leitner lived with the Family members for 33 years (from 1970-2003). (SAC ¶45) Leitner alleged that she contributed all of her “inheritance, income . . . work, time and labor” to the Family's pooled resources during that time. (SAC ¶¶ 45, 48 & 61) Leitner added to the SAC that when she left the Family in 2003, Defendants specifically promised her she would receive her money back, but not until she reached the retirement age of 65 years old. (SAC ¶¶2, 16, 39 & 61) Leitner did not return to the Family or contact the Family after leaving until nine years later in 2012 when she demanded money -- just as she had in 2003 and been rebuffed. (SAC ¶2, 47) She also alleged the pooled assets have an “estimated value ranging \$15,000,000 to \$30,000,000.” (SAC ¶ 52)

Leitner asserted ten claims in the FAC and SAC: (1) promissory estoppel; (2) unjust enrichment; (3) constructive fraud; (4) fraud; (5) breach of fiduciary relationship; (6) conversion; (7) **elder abuse**; (8) intentional infliction of emotional distress; (9) involuntary dissolution of joint venture; and (10) accounting. Defendants moved to dismiss all of the claims in the SAC as time-barred and unmeritorious.

B. Court Grants In Part Defendants' Motion To Dismiss The SAC

On June 10, 2014, the Court granted in part and denied in part Defendants' Motion to Dismiss the SAC (the “Order”). The Court dismissed all of Leitner's claims except for two: her **Elder Abuse** Claim and part of her Intentional Infliction of Emotional Distress claim. Order at 51-52.³ As to the **Elder Abuse** claim, the Court concluded Leitner failed to state a claim under California law, but noted a choice of law issue (between California and Oregon), and thus declined to dismiss the claim because the parties did not address the choice of law issue. *Id.* at 41-42. The Court held that the SAC alleged an intentional infliction of emotional distress claim premised on Defendants' alleged refusal to pay Leitner funds in 2012. *Id.* at 48-49.

The Court ruled that Leitner's intentional infliction of emotional distress claim premised on allegations of physical and emotional **abuse** while Leitner was with the Family (from 1970-2003) is time-barred. In reaching this ruling, the Court rejected Leitner's arguments that: (1) the allegations of **abuse** in 1970-2003 and the denial of her demand for money in 2012 are part of a “continuous tort” that delayed accrual of the limitations period until 2012; (2) Defendants' alleged **abusive** conduct estopped Defendants from asserting the limitations defense; and (3) Leitner was entitled to tolling for “insanity” based on “mental incapacity” after she left the Family. *Id.* at 42-47.

The Court also dismissed Leitner's promissory estoppel, fraud and conversion claims because she failed to allege a promise "sufficiently defined . . . to permit the court to assess damages." *Id.* at p. 21. Specifically, the SAC failed to allege "how defendants promised to calculate her proportionate share" of the alleged pooled assets. *Id.*

The constructive fraud, breach of fiduciary duty, involuntary dissolution of joint venture and accounting claims were dismissed because Leitner did not allege she was a joint venturer with any of the Defendants. The Court reached its conclusion on two independent bases: (1) the Family did not constitute a joint venture, and (2) Leitner alleged she was a victim of the "scheme," rather than a fellow member who shared control of the purported joint venture. *Id.* at 32-35. The conversion claim was dismissed because the SAC failed to identify a specific sum that was converted. *Id.* at 36-38. Lastly, all claims against Sadhana Temple were dismissed because Leitner failed to attribute any of the representations forming the basis for her claims to Sadhana Temple, a corporate entity. *Id.* at 28, n. 102.

The Court granted Leitner leave to file a Third Amended Complaint "should she be able to cure the deficiencies the court has noted." *Id.* at 52. The Court cautioned: "[s]hould the scope of any amendment exceed the scope of leave to amend granted by this order, the court will strike the offending portions of the pleading under [Rule 12\(f\)](#)." *Id.*

C. Allegations In The TAC

In the TAC, Leitner alleges she was promised her equal share would be calculated "as the amount of the Family's pooled assets at the time she turned 65 divided by the total number of Family members who had contributed and/or participated by that time (which is believed to be 15 members)." TAC ¶ 45. Leitner alleges that *at the time she left the Family* in 2003 Defendants Carson and Thompson orally promised her that she would receive her "share" of the Family resources at age 65 to induce her to quit claim real estate.⁴ *Id.* at ¶ 77.

Leitner alleges she shared control of the Family, which she delegated through powers of attorney. *Id.* at ¶ 60. Leitner alleges "the value of the labor, income, money, inheritance, bank accounts and property Leitner contributed to the Family over approximately 30 years is believed to be \$2,000,000" *Id.* at ¶ 116. Leitner further alleges Sadhana Temple and the Family are "alter egos of one another and of Kumar, Carson, Aschner and Thompson." *Id.* at ¶ 56.

The TAC continues to include the following allegations that the Court has already considered *and rejected*:

- that the Family is a joint venture (*Id.* at ¶ 154);
- that Plaintiff's claim for intentional infliction of emotional distress is premised on allegations of physical and mental **abuse** from 1970-2003 (*Id.* at ¶¶ 137-142);
- Defendants are estopped from asserting the limitations bar because of their alleged **abuse** from 1970-2003 (*Id.* at ¶ 151);
- Leitner is entitled to toll the statute of limitations for "mental incapacity" after she left the Family (*Id.* at ¶ 41);
- Claims against Sadhana Temple are valid without attributing representations to Sadhana Temple (*see* ¶ 151).

Lastly, Leitner removed the allegation that she was promised her funds would be "readily available upon her request." *Compare* SAC ¶ 45 *and* TAC ¶ 45.

III. ARGUMENT

A. The Applicable Legal Standards

To survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, “a complaint must contain sufficient factual matter . . . to ‘state a claim for relief that is plausible on its face.’ ” [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) *See also*, [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 570 (2007). Under *Iqbal* a court must conduct a two-part analysis. First, the court must accept as true well-pleaded factual allegations, but should disregard “bare assertions” and “legal conclusions.” *Id.* at 1951. Second, the court must determine whether the complaint's non-conclusory “factual content” is “plausibly suggestive of a claim.” [Moss v. U.S. Secret Service](#), 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678). The “plausibility” determination is a “context-specific task” requiring the court to “draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679 (2009). To be plausible, a complaint must allege more than the mere “possibility” of a claim. *Id.*

Under [Rule 12\(f\)](#), “[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” [Fed. R. Civ. P. 12\(f\)](#); [Whittlestone, Inc. v. Handi-Craft Co.](#), 618 F.3d 970, 973 (9th Cir. 2010) (“The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. . .”). Amending a pleading in a manner that exceeds the scope of leave to amend granted warrants striking the offending portions of the amended pleading. *See* Order at p. 52.

B. Leitner's Claim For Breach Of Fiduciary Duty Fails Because It Seeks To Relitigate Whether The Family Is A Joint Venture.

To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, a breach of that duty, and resulting damage. [Amtower v. Photon Dynamics, Inc.](#), 158 Cal. App. 4th 1582, 1599 (2008). Members of a joint venture owe each other fiduciary duties. *See, e.g., Weiner v. Fleischman*, 54 Cal. 3d 476, 483 (1991).

Leitner's breach of fiduciary duty claim is premised on her allegation that the Defendants' owed her a fiduciary duty based on their relationship as joint venturers. However, the Court rejected Leitner's contention that the Family is a joint venture:

Leitner's assertion that the Family was run as a business for profit is not tenable given the facts alleged in the complaint. Leitner does not clearly articulate the basis for this characterization. If she asserts the Family was a business merely because its members combined resources, her contention is unavailing because the pooling of resources is insufficient to support a finding that the parties were involved in a joint venture for profit. (Order at p. 34)

The TAC does not add *any* factual allegations to support the existence of a joint venture or to alter the Court's prior conclusion on this point. In fact, by reasserting her theory with no new allegations, Leitner has thumbed her nose at the Court's Order and tried to again plead that for which the Court told her she had no basis.

The Court also dismissed Leitner's breach of fiduciary duty claim on a different, independent ground: the facts alleged in the SAC did not establish that Leitner shared control of the alleged Family joint venture. As the Court explained, Leitner alleges she was the “*victim*” of a “scheme or conspiracy”:

The allegations in the complaint paint the picture of a group of people completely dominated by Kumar, the ‘guru’ of the Family who purportedly controlled its members with impunity. Aschner allegedly maintained the Family's money and finances but even her conduct was governed by Kumar, who singlehandedly “instruct[ed] and control[led] the Temple and ‘Family’ accounts.” (Order at p. 34-35 (emphasis added))

Leitner continues to allege -- as she must -- that Kumar “instructs and controls the Temple and ‘Family’ accounts.” (TAC ¶ 51) Thus, *even if* the Family constitutes a joint venture (the Court unequivocally held it does not), Leitner's added conclusory

allegation that she “delegated control” cannot save her breach of fiduciary duty claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the Court is only required to accept “well-pleaded facts,” not “labels and conclusions”).

Leitner's breach of fiduciary duty claim also assumes the Family is a joint venture when, based on the *exact same* operative facts alleged, the Court has already concluded it is not. Thus, the breach of fiduciary duty claim should be summarily dismissed. Alternatively, the breach of fiduciary duty claim (TAC ¶¶97-109, p. 46:28-47:8) should be stricken from the TAC.⁵

C. Leitner's Claim For Constructive Fraud Is Not Viable.

To state a claim for constructive fraud under California law, a plaintiff must allege: (1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage. *Cal. Civ. Code § 1573*; *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006). A plaintiff's constructive fraud claim is subject to the particularity requirement under *Rule 9(b)*. *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F. Supp. 2d 1009, 1021 (N.D. Cal. 2007).

Because Leitner's constructive fraud claim is dependent on her assertion that the Family is a joint venture, and the Court unequivocally held it is not, her constructive fraud should be dismissed. Alternatively, the constructive fraud claim (TAC ¶¶58-68, p. 46:5-13) should be stricken from the TAC.

D. The Conversion Claim Should Be Dismissed Because Leitner Fails To Identify Specific Funds That Were Converted.

To establish a cause of action for conversion, it must be alleged that: (a) plaintiff had the right to possession or ownership of specific, tangible personal property at the time of the conversion; (b) defendants actually and substantially interfered with that right; and (c) plaintiff suffered damages. *Messerall v. Fulwider*, 199 Cal. App. 3d 1324, 1329 (1988). “Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved . . .” *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1491 (2006). “It is not necessary that each coin or bill be earmarked.” *Haigler v. Donnelly*, 18 Cal. 2d 674, 681 (1941). Yet, “[t]he gravamen of the tort is the defendant's hostile act of dominion or control over a *specific chattel* to which the plaintiff has the right of immediate possession.” (emphasis added) *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal. App. 4th 384, 395 (2007); see *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 485 (1996) (conversion claim dismissed where money “came into the partnership accounts over time, in various sums, without any indication that it was held in trust”).

As the Court explained, the SAC did not allege the value of the real property she alleges was converted, only that it was “hundreds of acres.” (Order at p. 37:9-10) She continues instead with her vague assertion that the estimated total value of the pooled assets is approximately between \$15,000,000 and \$30,000,000. (SAC ¶¶ 37, 52; TAC ¶¶ 52, 120) This allegation is insufficient. (Order at p. 37:7-10); see *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal. App. 4th 384, 397 (2007) (affirming the entry of summary judgment for defendants because the evidence showed there could have been 8 to 18 bags of money containing between \$250,000 and \$500,000 each).

The TAC adds two allegations, but neither saves Leitner's conversion claim. First, Leitner alleges:

The value of the labor, income, money, inheritance, bank accounts and property Leitner contributed to the Family over approximately 30 years is believed to be \$2,000,000. (TAC ¶116)

Leitner does not identify the value of any particular asset or other factual basis for this wild estimate. But, more crucially, this allegation is irrelevant to Leitner's theory of her conversion claim. According to the TAC, each member is entitled to an equal share. While Leitner estimates that she contributed a sum she “believed to be \$2,000,000,” such is irrelevant to determining the amount converted based on her *own allegation* of the supposed promise.

Leitner adds a second pertinent allegation. In response to the Court's Order, she adds that her equal share is to be calculated as the Family's pooled assets at the time she reached 65, divided by the members who had contributed by the time she reached 65. The conversion claim still fails, however, because Leitner does not allege a crucial "variable" to plug into the formula: the value of the pooled assets. See *Trustees of S. Cal Pipe Trades Health & Welfare Trust Fund v. Temecula Mech., Inc.*, 438 F. Supp. 2d 1156, 1172 (C.D. Cal. 2006) ("[W]ithout any information on the variables . . . to plug into the formula, the existence of the formula itself provides little guidance as to how much money was in fact converted."). As discussed above, her vague estimate of the pooled assets' value --approximately \$15 million to \$30 million -- is insufficient. *PCO, Inc.*, 150 Cal. App. 4th at 397 (a claim for conversion of 8 to 18 bags of money containing between \$250,000 and \$500,000 fails to identify "a specific sum.").

Critically, Leitner has never defined who is actually in the "Family" and how long they have been or were members of the Family. She alleges there were 15 Family members who had contributed by the time she was 65, but there is no indication by name, or otherwise, how she comes up with 15 Family members at any given time. Accordingly, Leitner's conversion claim should be dismissed.

E. Leitner's Claim For Financial *Elder Abuse* Cannot Be Sustained.

The Court has already concluded that Leitner cannot state an *elder abuse* claim under California law. Order at p. 39-40 ("[A]llegations in the second amended complaint insufficiently plead that Leitner was an "*elder*" as that term is defined by the California statute at the time she requested her retirement fund, her *elder abuse* claim based on *Welfare & Institutions Code 15610.30(a)(1)* must be dismissed."). To avoid this reality, Leitner seeks to bring her *Elder Abuse* claim under Oregon law.

To determine the applicable state law, this Court must apply California choice of law principles. (Order at p. 41 (citing *Nelson v. Int'l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983)) Under California's choice of law analysis, "[p]resumptively, California law applies." *In re Conseco Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 2007 U.S. Dist. LEXIS 12786, 20 (N.D. Cal. Feb. 12, 2007) (citing *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1422 (9th Cir. 1989)); *N. California Collection Servs. Inc. of Sacramento v. Cent. Sierra Const., Inc.*, 2:06-CV-01899 JAM DAD, 2008 WL 3876266 (E.D. Cal. Aug. 20, 2008) aff'd sub nom. 370 F. App'x 774 (9th Cir. 2010) (California's choice of law test "embodies the presumption that California law applies unless the proponent of foreign law can show otherwise.").

California's choice of law analysis employs a three-step approach:

First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state," and then ultimately applies "the law of the state whose interest would be the more impaired if its law were not applied."

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107-08 (2006) (internal citations omitted). The burden is on the parties advocating to apply the other jurisdiction's laws to demonstrate that choice of law militates against applying California law. *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1422 (9th Cir. 1989); *Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 618 (C.D. Cal. 2007).

1. The *Elder Abuse* Law Of California And Oregon Differ.

Unlike Oregon's law, California's **Elder Abuse** law is limited to California residents. (Order at p. 39 (citing CAL. WELF. & INST. CODE § 15610.27)). Accordingly, Leitner fails to state a claim for **Elder Abuse** under California Welfare & Institutions Code Section 15610.30(a)(1) because she was not a California resident at the time of the alleged **abuse** (i.e., 2012). *Id.* On the other hand, Oregon's **Elder Abuse** law does not have a residency requirement, (Order at p. 40 (citing OR. REV. STATS. § 124.100(1)(a))). Thus, it is necessary to analyze the states' respective interests in having their **Elder Abuse** laws applied to this dispute.

2. California's Interest In Having Its Law Applied To This Dispute Heavily Outweighs Oregon's Interest.

The second and third steps of the test analyze each state's interest in having its law applied. If both states have an interest in having their law applied, there is a "true conflict." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107-08 (2006); *Denham v. Farmers Ins. Co.*, 213 Cal. App. 3d 1061, 1065 (1989). If there is a "true conflict," Courts consider the third prong of California's governmental interest test -- the "comparative impairment" test. Under that test, the Court considers "the legal question at issue and the relevant state interests at stake" to determine "which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case." *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 97, 102 (2010). Courts applying this test observe that "the state in which the alleged injury-producing conduct occurred (and in which a significant risk of harm to others is posed) generally has the predominant interest in determining the appropriate parameters of liability for conduct undertaken within its borders."

This case is a California dispute. This case arises from Leitner's living for decades with the Family *in California*, none of that time remotely involved any contact with Oregon. The TAC alleges the individual defendants reside and are domiciled in California. Defendant Sadhana Temple is registered to do business in California -- not Oregon. The "pooled assets" Leitner seeks consist of income from Family members who were California residents (earning money in California), and California properties (including one California property identified in Exhibit 2 of the TAC). Leitner also alleges a "substantial part of the events, acts or omissions giving rise to the claims [in the TAC] occurred in [Los Angeles]" (TAC 11) Lastly, the alleged injury-producing conduct was the denial *in California* of Leitner's request for money. *McCann*, 48 Cal. 4th at 97 (situation of the injury-producing event is generally state with interest in regulating conduct). Tellingly, Leitner has alleged each of her other claims under California law.

By contrast, Leitner has not identified *any* real property, money or other asset in Oregon, and has not alleged that any of the Family members other than Leitner has any contact with Oregon. She specifically alleges Kumar has "several addresses throughout the United States *except* in Oregon." TAC ¶ 5 (emphasis added). Leitner moved to Oregon only *after* cutting all ties with the California-based Family. The TAC paints a picture of Oregon as the locale of her "escape," where she went to remove herself entirely from all contact with the California-based Family. Thus, California's interest in this dispute outweighs Oregon's interest in governing its residents' California transactions. See *Denham*, 213 Cal. App. 3d at 1067 (internal citations omitted) (concluding Nevada law applied, noting "California's only link to this case is appellants' California residence").

Given that the operative facts all occurred in California, California has a strong interest in having the residency requirement of its **Elder Abuse** law applied here. California's legislature could have written California Welfare & Institutions Code § 15610.27 to include non-residents, but it did not do so. Were a foreign jurisdiction's law to apply to every **elder abuse** claim arising in California between California defendants and a non-resident plaintiff, the California legislature's decision to limit claims for **elder abuse** to California residents would be eviscerated.

Clearly, California law must be applied here because the **elder abuse** claim seeks redress against California defendants for conduct that occurred in California.⁶ The Court has previously ruled Leitner cannot state an **Elder Abuse** claim under California law. Thus, her claim under Oregon law cannot stand. (Order at p. 39-40).

F. Leitner's Claim For Intentional Infliction Of Emotional Distress Premised on Allegations Of Physical And Mental Abuse Cannot Be Sustained.

1. The Court Unequivocally Held The Claims For Physical And Mental Abuse Are Time-Barred.

Under California law, an intentional infliction of emotional distress claim is subject to a two-year statute of limitations. *See CAL. CODE CIV. PROC. § 335.1; Pugliese v. Super. Ct.*, 146 Cal. App. 4th 1444, 1450 (2007). In its Order, the Court held “[t]o the extent Leitner's IIED claim is based on conduct that took place in or before 2003, it is time-barred.” (Order at p. 44)

Nevertheless, the TAC includes the same allegations of physical and mental abuse against Mr. Kumar in the SAC in support of the intentional infliction of emotional distress claim. (TAC ¶ 136-140) In a desperate effort to avoid the time-bar, the TAC again alleges that “the very last act of Defendants' continuous outrageous conduct includes their refusal to give Leitner her [money] . . . in 2012.” (TAC ¶ 142) Yet that very same allegation was set forth in the SAC, to which the Court held that the “continuing tort” doctrine did not save the intentional infliction of emotional distress claim based on allegations of abuse while Leitner was with the Family. Those allegations are “of a *totally different type* than defendants' alleged refusal to give Leitner an equal share of the assets.” (Order at p. 44 (emphasis added)). Thus, by continuing to include allegations of physical abuse and/or the claim that the “outrageous conduct” was “continuous” until 2012, Leitner seeks to relitigate the same facts applied to the same law.

2. The Court Ruled That Tolling For “Mental Incapacity” Or Insanity Does Not Apply In This Case.

To save her intentional infliction of emotional distress claim, Leitner seeks to avail herself of exceptions to the statute of limitations bar. But, the Court has already considered -- and rejected -- the claim for intentional infliction of emotional distress. The TAC continues to argue that the same allegations of physical and mental abuse while Leitner was with the Family give rise to a claim that the Defendants are estopped from asserting the statute of limitations: “Defendants should be estopped from asserting [sic] statute of limitations on all other causes of actions [sic] given that Defendants have tortured, drugged, beaten, indoctrinated, raped, physically and mentally abused Plaintiff throughout the time she was with the ‘Family’.” *See, e.g.*, TAC at ¶ 40.

The Court's Order rejected that argument, holding:

While Leitner's claims of abuse are serious, the mere fact that a defendant has engaged in wrongdoing does not estop it from raising a statute of limitations defense. Otherwise, every plaintiff in every case could plead estoppel and prevent an untimely lawsuit from being dismissed. . . (Order at p. 45)

The changes to the TAC do not bear on the “estoppel” argument. Thus, the TAC seeks to relitigate this issue, which has already been decided by the Court.

3. The Court Ruled That Tolling For “Mental Incapacity” Or Insanity Does Not Apply Based On The Facts Alleged.

The TAC continues to allege that Leitner is entitled to a tolling of the limitations period for “mental incapacity” based on the Defendants' alleged abuse. The Court considered and rejected the argument that the factual allegations in the SAC, including the allegation that Ms. Leitner was “mentally incapacitated” after she left the Family, presented a basis to toll the limitations period based on insanity:

“As for Leitner's related argument that the statute of limitations was tolled because defendants' conduct mentally incapacitated her, defendants argue that Leitner has not adequately alleged an entitlement to tolling. The court agrees. . . While Leitner alleges that she suffered anxiety and post-traumatic stress disorder as a result of defendants' conduct, these conditions alone do meet the statutory definition of insanity.” Order at p. 45-46.

Since the TAC does not add new allegations to support this argument, this claim, once again, fails.

Given that each of Leitner's arguments with respect to the statute of limitations on her intentional infliction of emotional distress claim (based on **abuse** that occurred from 1970-2003) have been considered and rejected, the claim should be dismissed as time-barred. Alternatively, the allegations of **abuse** and the tolling/estoppel theories should be stricken.⁷

G. Leitner's Claims For Dissolution of Joint Venture And Accounting Lack Merit Because The "Family" Is Not A Partnership Or Joint Venture.

A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." [Cal. Corp. Code, § 16101\(9\)](#). As set forth above, the Court concluded that the Family is not a joint venture. (Order at p. 34) Leitner tries to cure this deficiency by adding in the TAC that she "delegated control she had in the Family." *See, e.g.*, TAC ¶ 155. But, that assumes the existence of a joint venture, which is an insupportable assumption. Thus, for the same reasons that Leitner's breach of fiduciary duty claim fails, Leitner's involuntary dissolution of joint venture claim fails as well. Thus, the involuntary dissolution of joint venture and accounting claims should be dismissed with prejudice. Alternatively, the involuntary dissolution of joint venture claim (¶¶ 153-165 and p. 28:9-17) and accounting claims (¶¶ 166-180) and p. 48:18-49:2) should be stricken.

H. All Of The Claims Against Sadhana Temple Fail.

Leitner's claims against Sadhana Temple cannot proceed past this juncture for several reasons. All of the claims against Sadhana Temple in the SAC were dismissed because Leitner did not allege that Sadhana Temple made any of the promises or representations that form the basis for her claims. The Court explained:

"[A]n entity cannot make representations except through its representatives, and Leitner has not identified the individuals who allegedly made statements on its behalf."

The Court explained that Leitner plead that the Family and the Temple are separate businesses, and the SAC did not clarify whether "defendants made the purported representations in their capacity as Family members, Temple owners/directors, or both. Nor is it clear from her allegations whether her donations of money and time went to the Family, the Temple, or both or whether her alleged retirement funds are being held by the Family, the Temple, or both." (Order at p. 28, n. 102)

The TAC does not cure this fatal deficiency. Instead, the TAC now alleges Mr. Kumar made the pertinent representations only on behalf of himself and "the Family, Carson, Aschner and Thompson . . ." TAC ¶ 63. Thus, Leitner does not allege that any of the pertinent representations were made on behalf of Sadhana Temple. Instead, Leitner alleges that Sadhana Temple is the alter ego of the other defendants, and seeks to "reverse" pierce the corporate veil of Sadhana Temple, a not-for-profit corporation, to hold it liable for the individual Defendants' alleged tort liability. Leitner cannot establish a right to proceed with this novel alter ego theory under New York law, and under California law "reverse" piercing of the corporate veil is not permitted to reach the assets of *any* corporation, let alone a non-profit corporation. *See Postal Instant Press, Inc. v. Kaswa Corp.*, 162 Cal. App. 4th 1510, 1513 (2008).

Even if Leitner could assert an alter ego theory, she has not adequately plead it. To plead alter ego liability, a plaintiff must establish two elements: "[f]irst, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1115 (C.D. Cal. 2003). "Conclusory allegations of 'alter ego' status are insufficient to state a claim. Rather, a plaintiff must allege specifically both of the elements of alter ego liability, as well as facts supporting each." *Id.* at

1116. It is the plaintiff's burden to "overcome the presumption of the separate existence of the corporate entity." *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1212 (1992).

Leitner has not met her burden to prove an alter ego claim. The TAC contains conclusions (i.e. there was no "separateness" between the Temple and the other defendants) and facts that do not bear on alter ego status, including allegations regarding how the defendants spent their own, *Family* money. (TAC ¶ 67) Setting aside these irrelevant allegations, the TAC alleges that the Defendants "commingled funds" and then "funneled" money through the not-for-profit Temple to evade taxes. *Id.* The TAC does not provide any further factual detail. These conclusory and vague allegations do not meet Leitner's burden to plead specific facts in support of each of the alter ego elements.

Even if an alter ego theory had been properly alleged, Leitner has not complied with procedural pre-requisites to dissolve and/or obtain money damages from a not-for-profit corporation. As a *former* member of Sadhana Temple, which Leitner contends has 15 members, she cannot bring claims seeking dissolution and/or liquidation of Sadhana Temple under either New York or California law. *See N.Y. Not-for-Profit Corp. Law §1101-1102* (more than 10% of active members required to bring claim seeking to dissolve not-for-profit corporation); *see also Cal. Corp. Code §8510* (more than 1/3 of active voting power of members required to bring claim for dissolution). Even if Leitner could bring such claims, she would need to have included the Attorney General of New York and/or California. *See N.Y. Not-for-Profit Corp. Law §1102(b)* (attorney general must be named in suit against not-for-profit corporation); *Cal. Corp. Code §8510(e)* (Attorney General must be served complaint to be given opportunity to intervene in action against non-profit); *Cal. Corp. Code § 5142 (same)*.⁸ Defendants have raised these procedural issues in earlier pleadings (*see, e.g.*, Doc. No. 55 at p. 18, n. 16), yet Leitner has not complied with this prerequisite to assert her claims. The TAC does not cure the deficiencies noted in the Court's Order, and thus, all of the claims against Sadhana Temple must be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss all claims against Sadhana Temple, and the claims for constructive fraud, breach of fiduciary duty, conversion, financial **elder abuse**, intentional infliction of emotional distress, involuntary dissolution of joint venture and accounting against all of the Defendants. Alternatively, and as set forth above, Defendants request that the allegations set forth above be stricken from the TAC.

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP

By: /s/ James E. Fitzgerald

James E. Fitzgerald

Attorneys for Defendants

Sadhana Temple of New York, Inc., Sarah Carson, Naomi Aschner, Barbara Thompson and Kunwar Surendra Kumar

Footnotes

¹ Leitner alleges this promise was made while she was allegedly "under the influence of various drugs." (FAC ¶¶16, 37-38)

² This allegation was removed from the TAC.

- 3 Leitner's claims for unjust enrichment and fraud (to the extent based on promises defendants allegedly made that she would be provided with financial security, privacy, healthy living, food, and spiritual comfort while living with the Family) were dismissed with prejudice.
- 4 This allegation, among others, flatly contradicts Leitner's deposition testimony in this case, which was taken before the TAC was filed. Defendants are prepared to move for sanctions under [Rule 11](#), if necessary, after providing Leitner an opportunity to withdraw the TAC.
- 5 Additionally, all of the following references in the TAC to the "joint venture" should be stricken:
- ¶ 1 at p. 2:1: "as part of a joint venture with Defendants";
 - ¶ 2 at p. 2:28-3:1: "The Temple is made up of the same Family members as the joint venture";
 - ¶ 2 at 3:18: "who was a part of the joint venture";
 - ¶ 9 at p. 5:4: "joint venturer, partner";
 - ¶ 17 at p. 7:10: "(partnership, joint venture)";
 - ¶ 30 at p. 10:11: "joint venture";
 - ¶ 43 at p. 12:18: "special relationship that of a joint venture";
 - ¶ 47, p. 13:20: "joint venture";
 - ¶ 70 at p. 20:18: "joint venture. Pursuant to the joint venture";
 - ¶ 71 at p. 20:24: "joint venture";
 - ¶ 71 at p. 20:25-21:3: "See *Orosco* . . . 370.)";
 - ¶ 73; ¶ 111 at p. 29:15: "joint venture. Pursuant to the joint venture."
- 6 Even if Oregon law applies, the Oregon statute requires Leitner to serve the Attorney General of Oregon with the Complaint within 30 days after commencing the Action. There is no proof of service reflecting that the Oregon Attorney General was served, and thus, the **Elder Abuse** claim cannot proceed under Oregon law. [Or. Rev. Stat. Ann. § 124.100\(6\)](#) ("A person commencing an action under this section must serve a copy of the complaint on the Attorney General within 30 days after the action is commenced.").
- 7 This includes the following allegations:
- ¶ 24, ¶ 27, ¶ 28, ¶ 32, ¶ 33, ¶ 34, ¶ 39, ¶ 40, ¶ 41, ¶ 57, ¶ 121, ¶ 132, ¶ 133, ¶ 138, 1139, ¶ 140, ¶ 151
 - ¶ 2 at p. 3:7-3:17: "Plaintiff fell victim . . . would constantly verbally and physically **abuse** each member."
 - ¶ 14 at p. 6:22-25: "As part of the initiation . . . the following morning."
 - ¶ 17 at p. 7:11-25: "that would, among other things . . . causing severe mental and psychological damage to Plaintiff."
 - ¶ 137 at p. 35:8:11: "Defendant . . . utilized mind games, physical **abuse** . . . sex, rape . . . to control Leitner."
 - ¶ 142 at p. 36:10: "The very last act of . . . continuous."
- 8 To the extent Leitner challenges Sadhana Temple's tax status as a 501(c)(3) charity organization, her challenge is improper. Leitner cannot challenge the IRS's tax designation as a private citizen through her suit against Sadhana Temple in this District Court. *See Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C. Cir. 1991), *cert denied*, 502 U.S. 1048 (1992).